

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4079

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4079

NEW YORK STATE COMMISSION ON CABLE TELEVISION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

NEW YORK STATE CABLE TELEVISION ASSOCIATION,
MANHATTAN CABLE TV, INC.,
Intervenors.

ON PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

CORNELIUS SHENEFIELD,
Assistant Attorney
General,

ROBERT E. NICHOLSON,
PIERRE DELACRUZ,
Attorneys.

DANIEL M. ARMSTRONG,
Associate General Counsel,

GREGORY M. CHRISTOPHER,
Counsel.

Department of Justice
Washington, D.C. 20530

Federal Communications Commission
Washington, D.C. 20554

TABLE OF CONTENTS

STATEMENT OF ISSUE	<u>Page</u> 1
COUNTERSTATEMENT OF THE FACTS	1
Development of the Rule Limiting Franchise Fees	2
The Declaratory Ruling	7
<u>ARGUMENT</u>	9
The Commission Is Not Compelled to Adhere to a Strict Interpretation of Its Cable Television Rule Where Such an Interpre- tation Would Result in a Distortion of the Regulatory Scheme and a Conflict with the Legislative History of the Rule	10
<u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

Cases:

	<u>Page</u>
<u>Alianza Federal de Mercedes v. FCC</u> , 539 F.2d 732 (D.C. Cir. 1976).	13
<u>Chisholm v. FCC</u> , 538 F.2d 349 (D.C. Cir. 1976).	13
<u>Lake County v. Rollings</u> , 130 U.S. 662 (1889).	12
<u>Ozawa v. United States</u> , 260 U.S. 178 (1922).	13
<u>River Wear Commissioners v. Adamson</u> , 2 App. Cas. 743 (House of Lords 1877).	11
<u>SEC v. Chenery Corp.</u> , 332 U.S. 194 (1947).	13
<u>Udall v. Tallman</u> , 380 U.S. 1 (1965).	13
<u>Unemployment Compensation Commission v. Aragon</u> , 329 U.S. 143 (1946).	13
<u>United Housing Federation, Inc. v. Forman</u> , 421 U.S. 837 (1975).	13
<u>United States v. American Trucking Ass'n, Inc.</u> , 310 U.S. 534 (1940).	12

Agency Decisions:

<u>Cable Television Report & Order</u> , 36 FCC 2d 143, reconsideration granted in part, 36 FCC 2d 326 (1972).	passim
<u>Clarification of the Cable Television Rules</u> , 46 FCC 2d 175 (1974).	passim
<u>Notice of Proposed Rulemaking</u> , 15 FCC 2d 417 (1968).	3

	<u>Page</u>
<u>Report & Order in Docket No. 21002</u> <u>Pike & Fischer RR 2d at _____</u> (1977).	passim
<u>Second Report & Order, 2 FCC 2d 725</u> (1966).	3
 <u>Statutes and Regulations</u>	
Judicial Review Act, 64 Stat. 1129, as amended, 28 U.S.C. §§2341-2352:	
Section 2342	2
Section 2343	2
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151-609:	
Section 402(a)	2
Section 405	13
Rules and Regulations of the Federal Communications Commission, 47 C.F.R. (1974):	
Section 76.1	3
Section 76.7	14
Section 76.31(b)	passim
 <u>Other Authorities:</u>	
<u>Botein, CATV; A Jumble of Jurisdictions,</u> 45 N.Y.U. L. Rev. 816 (1970).	3
<u>Cable Television: Promise versus Regulatory</u> <u>Performance</u> (Communications Subcommittee of the House Commerce Committee, Jan. 1976).	4
<u>R. Dickerson, The Interpretation and</u> <u>Application of Statutes</u> (1975).	12
<u>Sutherland Statutory Construction,</u> (4th ed. 1972).	13

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4079

NEW YORK STATE COMMISSION ON CABLE TELEVISION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

NEW YORK STATE CABLE TELEVISION ASSOCIATION,
MANHATTAN CABLE TV, INC.,
Intervenors.

On Petition for Review of Orders
of the Federal Communications Commission

BRIEF FOR RESPONDENTS

STATEMENT OF ISSUE PRESENTED

Whether the Commission is compelled to adhere to a strict interpretation of its own cable television rule where such an interpretation would result in a distortion of the regulatory scheme and a conflict with the legislative history of the rule.

COUNTERSTATEMENT OF THE FACTS

Under review is the FCC's declaratory ruling that a state or local regulatory authority may not impose additional

franchise fees upon cable television systems in excess of that permitted by the FCC's rules, even though the cable systems are generally "grandfathered" 1/ under the rules. This construction of the rule, declared the FCC, is consistent with the rules' intent and avoids a distortion of the regulatory scheme. New York State Commission on Cable Television, 59 FCC 2d 1344 (1976), reconsideration denied in pertinent part, 62 FCC 2d 975 (1977). (A. 3, 17). Jurisdiction lies with this Court pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342; venue lies pursuant to 28 U.S.C. 2343.

Development of the Rule Limiting Franchise Fees

The FCC rule governing this controversy is 47 C.F.R. 76.31(b), which states:

Franchise fees shall be no more than 3 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in light of the planned local regulatory program. With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977, whichever occurs first.

1/ "Grandfathered" denotes cable systems that were in operation prior to March 1972 when the applicable rules were adopted.

The rule was developed as part of a comprehensive rulemaking proceeding covering all aspects of cable television service such as broadcast signal carriage, public access, technical standards, and franchise standards. See generally Cable Television Report & Order, 36 FCC 2d 143, reconsideration granted in part, 36 FCC 2d 326 (1972); Clarification of the Cable Television Rules, 46 FCC 2d 175 (1974); 47 C.F.R. 76.1 et seq. The various rules resulted from numerous interwoven proceedings, and were presented as a single package because "each part has an impact on all the others." 36 FCC 2d at 147. Together, these rules were designed to promote the "orderly integration of cable television service into the national communications structure," 36 FCC 2d at 187, and to obtain the full benefits of this highly promising communications technology. Notice of Proposed Rulemaking, 15 FCC 2d 417, 418-21 (1968). 2/

2/ Two misstatements in Petitioner's brief should be corrected at the outset. First, whereas it states that "(p)rior to 1972 cable television was not regulated at all by the FCC," (brief at 5), in fact the FCC has asserted its jurisdiction since at least 1966. See, e.g., Second Report and Order, 2 FCC 2d 725 (1966), and its progeny. See generally Botein, CATV: A Jumble of Jurisdictions, 45 N.Y.U. L.Rev. 816 (1970). Second, petitioner repeatedly states that the rule under review was adopted in the face of, and contrary to, a Congressional staff report recommending that the franchise standards be eliminated. Brief at 6, 7, 8, & 16. That (footnote continued on next page)

Specifically, the limitation on franchise fees embodied in Section 76.31 was responsive to evidence that some municipalities were exacting exorbitant fees from cable systems far in excess of the costs of their regulation. While most fees were in the 5-6% range, "some have been known to run as high as 36 percent." 36 FCC 2d at 209. This development was of great importance to the FCC, because "high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy." 36 FCC 2d at 209. After extensive rulemaking, the FCC concluded that franchise fees between 3-5% of gross subscriber revenues "strike(s) a balance that permits the achievement of federal goals and at the same time allows adequate revenues to defray the costs of local regulation." 36 FCC 2d at 209. 3/

2/ (footnote continued from previous page)
report, issued by the House Commerce Committee's Communications Subcommittee and entitled "Cable Television: Promise versus Regulatory Performance," was issued in January 1976. The rule was adopted 4 years earlier in February 1972. See Cable Television Report & Order, 36 FCC 2d 143, 219 (1972). In any event, the staff report recommends the elimination of the franchise standards unless the standards are necessary to prevent frustration of federal objectives. See Report & Order in Docket No. 21002, Pike & Fischer RR 2d at ____ (1977). As explained infra, the franchise fee limitation was adopted precisely for that purpose.

3/ The franchise fee base has now been expanded to include all gross revenues, not merely subscriber revenues. This modification of the rule has no bearing on the instant proceeding. See Report and Order in Docket 21002, Pike and Fischer RR 2d ____ (1977).

Although the Commission concluded that franchise fees of between 3-5% would best serve the public interest, it recognized that many cable systems were already operating under franchises negotiated in good faith that provided for fees in excess of that standard. It decided, moreover, that the disruption caused by requiring immediate renegotiation and compliance would do more of a disservice to the public than would the excessive fee itself. See Reconsideration, 36 FCC 2d at 366. Accordingly, it added a "grandfather" provision to the rule, permitting such excessive fees to continue until March 31, 1977, or until the current franchise expires, whichever occurs first. ^{4/} "This deferral," said the Commission, "should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause." Report & Order, 36 FCC 2d at 210.

The FCC revisited the question two years later, and reaffirmed its conviction that a ceiling must be kept on franchise fees.

We have found no reason to change our position on this matter. The use of the franchise fee mechanism as a revenue raising device frustrates our efforts at developing a nationwide broadband communications grid. Excessive fees or other

^{4/} Grandfathered franchise fees may now continue in force until the expiration of the franchise, or for 15 years from the date it was granted, whichever occurs first. See Report and Order in Docket 21002, ___ Pike & Fischer RR 2d ___ (1977).

demands in effect create an obstruction to interstate commerce which must be avoided.

Clarification, 46 FCC 2d at 201. 5/ The FCC also clarified the nature of the grandfather rights that had been granted by the rule.

The certificate does not apply to renewal franchises or to the terms of franchises significantly amended in any way, such as a change in termination date, service obligations, or franchise fees. Any such substantial change or renewal we consider to effectively terminate the existing franchise and that termination (or in effect the granting of a new franchise) requires recertification (or certification in the first instance on grandfathered franchises.) Our "grandfathering" of pre-March 31, 1972, franchises was meant to give franchising authorities a reasonable amount of time in which to bring their franchises into compliance. If they are now changing provision in the franchises, they also have had ample opportunity to acquaint themselves with the new rules and will be expected to comply with all of our franchise requirements.

46 FCC 2d at 197. 6/ Thus, excessive franchise fees would be grandfathered only in the absence of significant amendments to the franchise.

5/ This conclusion was reached after studying the report of a special advisory committee composed of representatives of federal, state, and local governments, the cable industry and various public interest groups. See 46 FCC 2d at 177.

6/ Based on experience gained in the past five years, the FCC recently eliminated all federally-imposed franchise standards, but one. Significantly, the limit on franchise fees was retained. Report & Order in Docket No. 21002, Pike & Fischer RR 2d (1977).

The Declaratory Ruling

Shortly after Section 76.31 was adopted, the New York state legislature established a program of state regulation of cable television, and created the New York State Commission on Cable Television (hereinafter CCT), petitioner in this case, to administer the new regulations. See 18 McKinney's Consolidated Laws Sec. 811-831. Section 817 of the statute directed CCT to collect up to one percent (later increased to two percent) of the gross annual receipts of all cable television systems in the state to cover the cost of the regulatory program. (A. 31-32).

Several cable television operators, including intervenor Manhattan Cable Television, Inc., refused to pay some or all of the assessed fee. The systems argued that the state fee could not be added to the grandfathered municipal franchise fee which was already in excess of the 5% normally permitted by the FCC's rules. CCT thereafter sought a declaratory ruling from the FCC that collection of a 2% state fee would be consistent with Section 76.31(b). CCT also brought suit in the state Supreme Court to collect the fee, but Manhattan Cable obtained a stay of those proceedings pending the outcome of the FCC action.

Insofar as is pertinent here, the FCC held that the state franchise fee, when combined with the grandfathered municipal fee, must not exceed 5%. New York State Commission on Cable Television, 59 FCC 2d 1344 (1976). (A. 3). The FCC declared that "because the state fee was imposed after March 31, 1972, it is subject to the fee limitation and is not considered outside of the Section 76.31(b) limitation until March 31, 1977, as are fees imposed at an earlier date." 59 FCC 2d at 1353. (A. 14). In other words, the FCC held that excessive municipal fees imposed prior to the adoption of 76.31(b) would be allowed to continue temporarily for the reasons stated when the rule was adopted. See Counterstatement at 5-6. However, that reasoning does not apply to excessive fees imposed subsequent to the adoption of the rule.

Again, we state our belief that fees in excess of 5% are an unreasonable interference with federal regulatory goals for the development of a nationwide cable communication industry. We have accepted grandfathered fees in excess of 5% only until March 31, 1977, to allow a reasonable transition period. The imposition of additional burdens on top of an already burdensome situation is unacceptable.

59 FCC 2d at 1353. (A. 14).

CCT petitioned for reconsideration, reiterating its belief that "even the imposition of new and higher fees imposed on 'grandfathered' cable television systems during the interim period should be considered acceptable." See

New York State Commission on Cable Television, 62 FCC 2d at 977. (A. 17). But the FCC rejected this claim, emphasizing that 76.31 must be read in light of the Report and Orders that adopted, reconsidered, and clarified it. 62 FCC 2d at 978. (A. 22). In those documents, as mentioned, the FCC had explained that a grandfather provision was included "to avoid 'minor dislocations'" and to protect justifiable reliance by the cable operator and the franchising authority on specific franchise terms negotiated before they were placed on notice of the contents of the new rules. See Cable Television Report & Order, 36 FCC 2d at 210; Reconsideration, 36 FCC 2d at 366. "That equitable concept," said the FCC, "would be destroyed if, taking petitioner's view, the franchise fee were free to rise indiscriminately beyond its pre-1972 contract level." 62 FCC 2d at 978. (A. 23). See also Clarification, 46 FCC 2d at 196-97.

CCT filed a petition for review with the Court on March 25, 1977.

ARGUMENT

Petitioner CCT seeks to exploit the "plain meaning" of Section 76.31 of the rules by imposing franchise fees on grandfathered cable systems in excess of that found by the FCC

to be reasonably necessary or desirable. Whereas systems that commenced operation after the rule was adopted in February 1972 are protected by the fee limitation, CCT seeks to place an undue and unjustified burden on grandfathered systems. However, neither the rules of statutory interpretation nor the paramount public interest requires that the legislative history and intent be ignored.

The Commission Is Not Compelled to Adhere to a Strict Interpretation of Its Cable Television Rule Where Such an Interpretation Would Result in a Distortion of the Regulatory Scheme and a Conflict with the Legislative History of the Rule.

As described in detail in the Counterstatement, the FCC adopted 76.31(b) because it had documented a trend towards ever higher franchise fees that, unless checked, would severely restrict the growth of the cable television industry well before it reached its full potential. The FCC held this to be "a matter of great importance" because "high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy." Cable Television Report & Order, 36 FCC 2d at 209.

And while the FCC chose temporarily to grandfather existing fees that were in excess of the 3-5% standard, there is absolutely no indication that it intended to sanction the creation of more or greater inconsistencies with the rule. To the contrary, to have done so would have significantly undermined its stated objectives.

Thus, considering the disputed rule in light of the FCC orders that adopted, reconsidered, and clarified it (see Counterstatement at 5-6), and the prevailing public interest considerations, the legislative intent is clear. The excessive grandfathered fee may not be raised further. Nevertheless, petitioner CCT clings to the "plain meaning" of the rule as if mere recital supercedes all else. But the Courts have recognized that legislative draftsmen cannot be expected to anticipate and provide for every possible application of the statute. Consequently, the doctrine was long ago stated that "we are to . . . (give) the words their ordinary signification, unless as applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification" River Wear Commissioners v. Adamson, 2 App. Cas. 743, 764-65 (House of Lords 1877). Accord,

Lake County v. Rollings, 130 U.S. 662, 670 (1889).

One noted commentator has aptly described CCT's argument: "Statutory words must be given effect according to their relevant dictionary senses. (citation omitted) So stated, the rule is simply nonsense; to exclude consideration of context would be to ignore one of the basic principles of communication." R. Dickerson, The Interpretation and Application of Statutes 230 (1975). In other words, "(a)t best, there should be no plain meaning 'rule,' only a plain meaning 'assumption.'" R. Dickerson at 233.

In the seminal case of United States v. American Trucking Ass'n, Inc., 310 U.S. 534 (1940), the Supreme Court discussed this concept at length:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed the plain meaning. When that meaning has led to absurd ^{7/} or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole," this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words as used in

^{7/} "Absurdity" normally refers to internal statutory harmony rather than the rationality of the results. R. Dickerson, supra, at 231 n.43.

the statute is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." (citation omitted)

310 U.S. at 543-44. Accord, United Housing Federation, Inc. v. Forman, 421 U.S. 837, 849 (1975).

Here, the FCC found that CCT's interpretation of 76.31(b) is "plainly at variance with the policy of the legislation as a whole." See Ozawa v. United States, 260 U.S. 178, 194 (1922). And it should be kept in mind that this is the judgment of the agency that drafted the rule and which is charged with its administration. This is not a case of the FCC attempting to discern Congressional intent. Therefore, its judgment should be given even greater deference than usual. See Udall v. Tallman, 380 U.S. 1 (1965); Sutherland Statutory Construction Sec. 31.06 (4th ed. 1972). See also Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 153 (1946).

Finally, 8/ CCT complains that the FCC's interpretation will deprive it of the necessary funds to carry out its

8/ CCT also sketches an argument that the FCC should have proceeded here by rulemaking rather than by adjudication. (brief at 12). However, that argument was not raised below, except in CCT's off-hand comment in its petition for reconsideration that the FCC should "perhaps" treat the grandfather issue "in a separate proceeding." (A. 36). Thus, this issue is not properly before this Court. See 47 U.S.C. 405; Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 739 (D.C. Cir. 1976). In any event, the choice between rulemaking and adjudication is one for the informed discretion of the agency. See SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947); Chisholm v. FCC, 538 F.2d 349, 365 (D.C. Cir. 1976). CCT has not even attempted to demonstrate that the FCC abused that discretion.

regulatory program (brief at p. 8) and that affirmance by this Court would "judicially legislate the State Commission virtually out of existence." (brief at p. 17) These claims have never been documented, either before the FCC or in its brief to this Court. And even assuming that an excessive franchise fee could be justified, CCT can still come to the FCC and request that the 5% ceiling be waived. See 47 C.F.R. 76.7, which states:

On petition by a . . . franchising authority . . . the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

As the FCC said recently when specifically addressing this question, "Even the rule's upper limit of five percent is not immovable, but can be waived upon persuasive showing in the public interest, as is true of all other rules." Report and Order in Docket No. 21002, ___ Pike & Fischer RR 2d ___ (1977). In short, if an exception to the regulatory scheme is necessary to CCT's survival, this should be explored in a proceeding for special relief and not sought through a nonsensical interpretation of the grandfathered franchise fee rule.

As shown, the FCC's interpretation of 76.31 is fully supported by compelling public interest considerations and is permitted under the more persuasive, common sense rules of statutory construction. The FCC has not abused its discretion, and its Orders should therefore be affirmed.

Respectfully submitted,

September 30, 1977

John H. Shenefield,
Assistant Attorney General,

Robert Nicholson,
Attorney,

Peter Delacruz,
Attorney.

Department of Justice
Washington, D. C. 20530

Daniel M. Armstrong,
Associate General Counsel,

Gregory M. Christopher,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK STATE COMMISSION ON
CABLE TELEVISION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

NEW YORK STATE CABLE TELEVISION
ASSOCIATION,
MANHATTAN CABLE TV, INC.,
Intervenors.

No. 77-4079

CERTIFICATE OF SERVICE

I, Lily S. Tom, hereby certify that the foregoing
printed "Brief for Respondents" was served this 30th day of
September 1977, by mailing true copies thereof, to the
following persons at the addresses listed below:

Louis J. Lefkowitz, Esq.
Attorney General of the
State of New York
Philip Weinberg, Esq.
Assistant Attorney General
of the State of New York
Two World Trade Center
New York, N. Y. 10047
Counsel for Petitioner

David W. Smith, Esq.
Pryor, Cashman & Sherman
410 Park Avenue
New York, N. Y. 10022
Counsel for Manhattan
Cable Television, Inc.

Susan P. Carr, Esq.
Paul, Weiss, Rifkind, Wharton
and Garrison
345 Park Avenue
New York, N. Y. 10022
Counsel for New York State
Cable Television Assoc.

Lily S. Tom

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK STATE COMMISSION ON
CABLE TELEVISION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

NEW YORK STATE CABLE TELEVISION
ASSOCIATION,

MANHATTAN CABLE TV, INC.,

Intervenors.

No. 77-4079

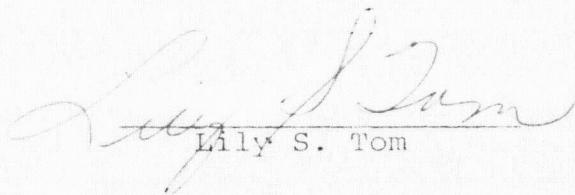
CERTIFICATE OF SERVICE

I, Lily S. Tom, hereby certify that the foregoing
printed "Brief for Respondents" was served this 30th day of
September 1977, by mailing true copies thereof, to the
following persons at the addresses listed below:

Louis J. Lefkowitz, Esq.
Attorney General of the
State of New York
Philip Weinberg, Esq.
Assistant Attorney General
of the State of New York
Two World Trade Center
New York, N. Y. 10047
Counsel for Petitioner

David W. Smith, Esq.
Pryor, Cashman & Sherman
410 Park Avenue
New York, N. Y. 10022
Counsel for Manhattan
Cable Television, Inc.

Susan P. Carr, Esq.
Paul, Weiss, Rifkind, Wharton
and Garrison
345 Park Avenue
New York, N. Y. 10022
Counsel for New York State
Cable Television Assoc.


Lily S. Tom